Petition

Office - Supreme Court, U.S.
FILED
APR 16 1982
ALEXANDER L. STEVAS,
CLERK

81-1987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

BRADLEY BRYANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OSCAR B. GOODMAN, ESQ.
Goodman, Terry, Stein & Quintana
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner

CLB PUBLISHERS & LITHOGRAPHERS, INC. • (301) 933-5220

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in ruling that the convictions herein were not obtained on the basis of evidence seized in violation of the Fourth Amendment of the United States Constitution?

2. Were the Petitioner's rights under the Double Jeopardy and Due Process Clauses of the Fifth Amendment of the United States Constitution violated by the reception of highly prejudicial evidence linking the Petitioners in a common scheme or plan to commit some illegal activity?

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE CONVICTIONS HEREIN WERE OBTAINED ON THE BASIS OF EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION 5

II. THE PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE RECEPTION OF HIGHLY PREJUDICIAL EVIDENCE LINKING THE PETITIONER IN A COMMON SCHEME OR PLAN TO COMMIT SOME ILLEGAL ACTIVITY 7

CONCLUSION 8

CERTIFICATE OF SERVICE 9

APPENDIX "A" ..... App. A

TABLE OF AUTHORITIES

Cases: *Page*

Brinegar v. United States,
338 U.S. 160 (1949) 5

Franks v. Delaware,
438 U.S. 154 (1978) 5

United States v. Cortina,
630 F.2d 1207 (7th Cir., 1980) 5

United States v. Inmon,
568 F.2d 326 (3rd Cir., 1977) 7

United States v. Keller,
624 F.2d 1154 (3rd Cir., 1980) 7

United States v. Mespoulede,
597 F.2d 329 (2nd Cir., 1979) 8

United States v. Rettig,
589 F.2d 418 (9th Cir., 1978) 5

Whiteley v. Warden,
401 U.S. 560 (1971) 5, 6

United States Code

18 U.S.C. §2 1

26 U.S.C. §5841 2

26 U.S.C. §5842 2

26 U.S.C. §5861(d) 2

26 U.S.C. §5861(i) 2

26 U.S.C. §1254(1) 2

United States Constitution

Fifth Amendment .....i, 7, 8

Fourth Amendment .....i, 5

Federal Rules of Evidence

Rule 403 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. _____

BRADLEY BRYANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, BRADLEY BRYANT, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on or about February 16, 1982.

OPINION BELOW

On February 16, 1982, the Court of Appeals entered its Opinion affirming the conviction of the Petitioner (hereafter, Defendant) for violations of two aiding and abetting (18 U.S.C. §2) counts for (1) possession of an unregistered

firearm (silencer) in violation of 26 U.S.C. §5841 and §5861(d); and (2) possession of a firearm (the same silencer) not identified by a serial number in violation of 26 U.S.C. § §5842 and 5861(i). The Opinion of the Court of Appeals is set out in full as Appendix "A" hereof.

The Defendant is presently incarcerated, as his bail pending appeal was revoked when he was charged by State authorities in Illinois.

JURISDICTION

Jurisdiction was initiated by criminal indictment of a federal grand jury and jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Defendant, together with Co-Defendants, were accused in a three-count indictment in the United States District Court for the Eastern District of Pennsylvania. The first count was a conspiracy to knowingly possess a silencer, not registered and not bearing a serial number. The second and third counts charged the Defendant with Aiding and Abetting the possession of this silencer and Aiding and Abetting the possession of the silencer not identified by a serial number. Upon a motion by the Defendant to dismiss the conspiracy count due to his prior trial and acquittal on a similar conspiracy violation in the United States District Court for the Eastern District of Kentucky, the Lower Court herein granted the motion to dismiss the conspiracy but denied the motion to dismiss the two remaining counts.

The entire case was based upon a search warrant prepared by a Philadelphia policeman and issued by a Municipal Court judge of the City of Philadelphia, authorizing a search of a room at an airport hotel in Philadelphia. This search warrant authorized the seizure of certain controlled substances. While the affidavit in support of the search warrant was being prepared, policemen were sent to the airport to keep the Defendant under surveillance. The Defendant was arrested at the airport, for suspicion of a felony, and was later told that his arrest was "for narcotics". The Defendant's luggage was retrieved from the airline, opened and searched at Police Headquarters, after the police received a message that there was a search warrant for the luggage. The only warrant presented was the warrant for the hotel room.

Pursuant to the warrant, the hotel rooms in question were searched, and no controlled substances were found. No State charges were ever made against the Defendant.

A pivotal aspect of the affidavit for the search warrant was a representation that a police officer had smelled the odor of marijuana from the room to be searched. However, the issuing magistrate was never informed that the day before the warrant was issued, a policeman had actually entered the room and had observed no controlled substance of any nature within.

The probable cause for the search warrant was based upon the observations of certain individuals within the hotel and upon an entry into the room by police security and a policemen when these individuals were not within the room. Further, the police officer stated that on some occasions, a slight odor of marijuana could be detected within the area of the room in question.

The Lower Court ruled that the police officer's failure to see any narcotics inside the room when he entered was not a

fact which would or could have altered the finding of probable cause by the issuing magistrate, so that the non-disclosure of this fact to the magistrate was not an error.

The Lower Court further ruled that the arrest of this Defendant at the airport was based upon probable cause, that the search of his person incident to this arrest was lawful, and that the evidence thereby found was legally seized. The Court ruled that the arresting officers did not know what conduct of the Defendant gave probable cause for his arrest, but they acted under instructions from officers "fully informed of the facts". These facts are briefly that the Defendant was one of the men staying in the room; that he had been seen paying for the room in cash; that he had registered under a false name; that many long distance calls had been made from the room; and that his trip to the airport with his luggage could reasonably have been interpreted as a culmination of a narcotics transaction.

The Lower Court did suppress the search of the Defendant's luggage as being unlawful.

Many items seized from the room pursuant to the search warrant were introduced in evidence other than the silencer which formed a basis for the two counts of the indictment. These items of evidence were introduced under the Doctrine of "common scheme or design" and the exhibits were admitted as probative of such common scheme or design to perform some unstated and unknown act or purpose.

Certain items taken from Defendant BRYANT at the airport, retrieved from his wallet, were admitted into evidence, including firearms licenses and driver's licenses in names other than the Defendant's. These items were admitted over objection.

REASONS FOR GRANTING THE WRIT

I.

THE CONVICTIONS HEREIN WERE OBTAINED ON THE BASIS OF EVIDENCE SEIZED IN VIOLATION OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The affidavit upon which the search warrant was issued for the hotel room in question herein contained material misrepresentations, and omitted information material on the probable cause issue, and the search warrant, the evidence seized thereunder, and all the derivative fruits thereof were required to be suppressed under the Doctrine of *Franks v. Delaware*, 438 U.S. 154 (1978); or as a fraud on the judicial system, *United States v. Cortina*, 630 F.2d 1207 (7th Cir., 1980); or as infringing the power of the magistrate to know the true purpose of the intended search and to exercise magisterial power to exercise meaningful supervision over the conduct of the searching agents and to define the proper limits of the warrant under *United States v. Rettig*, 589 F.2d 418 (9th Cir., 1978).

The warrantless arrest of the Defendant and the warrantless search of his person and the seizure of his luggage and evidentiary use of certain items thereof were in violation of the Fourth Amendment of the United States Constitution under *Whiteley v. Warden*, 401 U.S. 560 (1971) and *Brinegar v. United States*, 338 U.S. 160 (1949).

In the instant case, the proof is overwhelming that the affidavit omitted to inform the magistrate that a prior entry had been made by police officers into the room in question,

and that said police officers had seen no drugs or drug paraphernalia. The affidavit also failed to state that the Defendant, and the Co-Defendants, had not returned to the room in question between 6:30 and 7:30 P.M. on the day in question when the police officer allegedly smelled the odor of marijuana near the room. The affidavit also failed to state that the source of marijuana odor was determined by hotel security to be coming from the employees lounge and not from the room in question. The manifest purpose of the police in this case was to search the rooms in question and the luggage of the Defendant for firearms because a firearm had been observed upon the entry of a policeman into the room. However, the affidavit in support of the search warrant did not mention the firearms, but did base the probable cause upon narcotics and narcotics paraphernalia. When the false and misleading content is removed from the affidavit for the search warrant, no probable cause remains. As to the arrest and seizure of the Defendant at the airport, there was no evidence offered by the Government that any "silencer" had been found when the police at the airport were instructed to arrest this Defendant. The holding of *Whiteley v. Warden, supra.*, is that when police are asked to aid other officers in making an arrest, such arresting officers are entitled to assume that the arrest is supported by probable cause; but where the officers directing the arrest do not have probable cause, an otherwise illegal arrest cannot be insulated from challenge by the decision of an instigating officer to rely on fellow officers to make the arrest. The Lower Court's ruling, and the Court of Appeals affirmance, that probable cause existed for the arrest of Defendant BRYANT at the airport, and a search incident to this arrest, is erroneous as a matter of law.

II.

THE PETITIONER'S RIGHTS UNDER THE DOUBLE JEOPARDY AND DUE PROCESS CLAUSES OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE RECEPTION OF HIGHLY PREJUDICIAL EVIDENCE LINKING THE PETITIONER IN A COMMON SCHEME OR PLAN TO COMMIT SOME ILLEGAL ACTIVITY.

It is submitted that this trial was conducted in violation of the Double Jeopardy and Due Process rights of the Defendant under the holdings of *United States v. Inmon*, 568 F.2d 326 (3rd Cir., 1977) and *United States v. Keller*, 624 F.2d 1154 (3rd Cir., 1980), because the Government though barred from prosecuting the Defendant for conspiracy, nevertheless did try him for conspiracy under the guise of proving a "common scheme or plan". Additionally, evidence offered to establish a common scheme or plan consisted of proof of improper and dangerous conduct in the nature of "other crimes" evidence, in violation of the requirements of the Due Process Clause incorporated in Rule 403, Federal Rules of Evidence.

The acquittal of the Defendant in Kentucky barred the Government from prosecuting him under the conspiracy count of the superseding indictment.

It is submitted by the Defendant that it is not within the contemplation or the intendment of the law that a conspiracy count can be warmed over by the prosecution and re-served as a "common scheme or plan" to prove mutual aiding and abetting of two substantive counts.

Once a Defendant has satisfied one jury that he is not guilty of a crime, constitutionally routed considerations of fairness preclude the Government from injecting any issues necessarily decided in his favor into a second trial for another offense. *United States v. Mespoulede*, 597 F.2d 329 (2nd Cir., 1979).

The reception of the evidence in this matter of a "common scheme or plan" also violated the Defendant's rights under the Due Process Clause of the Fifth Amendment of the United States Constitution as having a prejudicial effect which far outweighed any permissible probative value the evidence had, contrary to Rule 403, Federal Rules of Evidence.

CONCLUSION

Based on the above two questions presented, it is respectfully stated that review of this case is necessary to remedy the errors committed by the Court Below.

Respectfully Submitted:

Goodman, Terry, Stein & Quintana

By _____
OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 15th day of April, 1982, postage prepaid, to: The Honorable Wade H. McCree, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

LORETTA J. WENTZEL

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-1729

UNITED STATES OF AMERICA,

Appellee,

v.

BRYANT, BRADLEY

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Criminal No. 80-00065-01)

Submitted Under Third Circuit Rule 12(6)
January 12, 1982

JUDGMENT ORDER

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges*, and ACKERMAN,* *District Judge.*

After considering the contentions raised by appellant, to-wit, that the court erred in:

1. admitting evidence seized in violation of the Fourth Amendment of the United States Constitution;

2. violating appellant's rights under the Double Jeopardy and Due Process Clauses of the Fifth Amendment of the United States Constitution by receiving highly prejudicial evidence linking the appellants in a common scheme or plan to commit some illegal activity.

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

James Hunter, III, *Circuit* Judge

Attest,

Sally Mrvos, *Clerk*

February 16, 1982

*Honorable Harold A. Ackerman, United States District Judge for the District of New Jersey, sitting by designation.